

SENATE BILL 347

By Tracy

AN ACT to amend Tennessee Code Annotated, Title 4,  
Chapter 3, Part 23; Title 54 and Title 65, relative to  
transportation.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 54, is amended by adding the following language as new chapter 23:

Section 54-23-101. This chapter shall be known and may be cited as the "Public-Private Transportation Act of 2007".

Section 54-23-102.

As used in this chapter, unless the context otherwise requires:

(1) "Affected local jurisdiction" means any county or municipality in which all or a portion of a qualifying transportation facility is located;

(2) "Certificate" means the certificate of public convenience and necessity issued to an operator under this chapter that permits operation of a qualifying transportation facility;

(3) "Comprehensive agreement" means the comprehensive agreement between the operator and the responsible public entity required by § 54-23-111;

(4) "Operator" means the private entity that is responsible for operation of a qualifying transportation facility;

(5) "Private entity" means any natural person, corporation, limited liability company, partnership, joint venture or other private business entity;

(6) "Public entity" means the state and any agency or authority thereof, any county, municipality and any other political subdivision of any of the foregoing;

(7) "Qualifying transportation facility" means one or more transportation facilities operated by a private entity pursuant to this chapter;

(8) "Regulatory authority" means the department of transportation;

(9) "Responsible public entity" means a public entity that has the power to acquire, construct or improve the applicable transportation facility;

(10) "Revenues" means the user fees and/or service payments generated by a qualifying transportation facility;

(11) "Service contract" means a contract entered into pursuant to § 54-23-106;

(12) "Service payments" means payments to the operator of a qualifying transportation facility pursuant to a service contract;

(13) "State" means the state of Tennessee;

(14) "Transportation facility" means any road, bridge, tunnel, overpass, ferry, airport, mass transit facility or similar commercial facility used for the transportation of persons or goods, together with any other property that is needed to operate the same, but shall exclude railroads, railroad-related facilities and pipelines owned by a public utility and rail mass transit facilities owned by an interstate compact agency; and

(15) "User fees" mean the rates, fees or other charges imposed by the operator of a qualifying transportation facility for use of all or a portion of such qualifying transportation facility.

#### Section 54-23-103.

(a) The general assembly finds that:

(1) There is a public need for timely acquisition or construction of and improvements to transportation facilities within the state;

(2) Such public need may not be wholly satisfied by existing ways in which transportation facilities are acquired, constructed or improved; and

(3) Authorizing private entities to acquire, construct, improve and/or operate one or more transportation facilities may result in the acquisition or construction of or improvements to transportation facilities in a more timely or less costly fashion, thereby serving the public safety and welfare.

(b) An action, other than the approval of the responsible public entity under § 54-23-105 or issuance of a certificate under § 54-23-107, shall serve the public purpose of this chapter if such action facilitates the timely acquisition or construction of or improvement to a qualifying transportation facility or the continued operation of a qualifying transportation facility.

(c) It is the intent of this chapter that transportation financing be expanded and accelerated to improve and add to the convenience of the public, and such that public and private entities may have the greatest possible flexibility in contracting with each other for the provision of the public services which are the subject of this chapter.

(d) This chapter shall be liberally construed in conformity with the purposes hereof.

Section 56-23-104.

No private entity may operate a transportation facility under this chapter without first obtaining approval of the responsible public entity, obtaining a certificate from the regulatory authority and entering into a comprehensive agreement with the responsible public entity.

Section 54-23-105.

(a) Prior to the approval of the responsible public entity, the private entity shall provide the following material and information with respect to the transportation facility or facilities that the private entity proposes to operate as a qualifying transportation facility:

(1) A topographic map (1:2,000 or other appropriate scale) indicating the location of the transportation facility or facilities;

(2) A description of the transportation facility or facilities, including the conceptual design of such facility or facilities and all proposed interconnections with other transportation facilities;

(3) The projected cost of the transportation facility or facilities and the proposed date for acquisition of or the beginning of construction of, or improvements to the transportation facility or facilities;

(4) A statement setting forth the method by which the operator proposes to secure all property interests required for the transportation facility or facilities, including:

(A) The current owners of the property needed for the transportation facility or facilities;

(B) The nature of the interest in the property to be acquired; and

(C) Any property that the responsible public entity is expected to be requested to condemn;

(5) Information relating to the current transportation plans, if any, of each affected local jurisdiction;

(6) A list of all permits and approvals required for acquisition or construction of or improvements to the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining such permits and approvals;

(7) A list of public utility facilities, if any, that will be crossed by the transportation facility or facilities and a statement of the plans of the operator to accommodate such crossings;

(8) A statement setting forth the operator's general plans for operation of the transportation facility or facilities; and

(9) Such additional material and information as the responsible public entity may reasonably request.

(b) The responsible public entity shall grant approval if the operation of the transportation facility or facilities as a qualifying transportation facility serves the public purpose of this chapter. The responsible public entity may determine that the operation of the transportation facility or facilities as a qualifying transportation facility serves such public purpose if:

(1) The application is complete;

(2) There is a public need for the transportation facility or facilities of the type the private entity proposes to operate as a qualifying transportation facility;

(3) The transportation facility or facilities and the proposed interconnections with existing transportation facilities are compatible with the existing transportation plan for the state;

(4) The estimated cost of the transportation facility or facilities is reasonable;

(5) The private entity's plans will result in the timely acquisition or construction of or improvements to the transportation facility or facilities or their more efficient operation; and

(6) The operator's plan for operation of the transportation facility or facilities is reasonable and is consistent with state, regional and local transportation plans.

(c) The responsible public entity may charge a reasonable fee to cover the costs of processing and reviewing the request for approval.

(d) The approval of the responsible public entity shall be subject to the private entity's entering into a comprehensive agreement with the responsible public entity.

(e) In connection with its approval of the operation of the transportation facility or facilities as a qualifying transportation facility, the responsible public entity shall establish a date for the acquisition of, or the beginning of construction of, or improvements to the qualifying transportation facility. The responsible public entity may extend such date from time to time.

Section 54-23-106.

In addition to any authority otherwise conferred by law, any public entity may contract with an operator for transportation services to be provided by a qualifying transportation facility in exchange for such service payments and other consideration as such public entity may deem appropriate.

Section 54-23-107.

(a) It shall be unlawful for any private entity to construct, enlarge or acquire, by lease or otherwise, any transportation facility without first having obtained a certificate from the regulatory authority that the public convenience and necessity require the construction, enlargement or acquisition by the private entity. The regulatory authority may issue the certificate if it finds that:

(1) There is a public need for the construction, enlargement or acquisition of the transportation facility by the private entity;

(2) The cost estimates, choice of technology, construction plans and proposed manner of financing the construction, enlargement or acquisition are reasonable;

(3) There are no suitable alternatives to the proposed construction, enlargement or acquisition;

(4) The private entity proposing the construction, enlargement or acquisition is viable, technically, managerially and financially, to carry out the proposal;

(5) The responsible public entity has approved the construction, enlargement or acquisition; and

(6) The proposed construction, enlargement or acquisition is otherwise in the public interest when compared to substantially similar construction, enlargement or acquisition of transportation facilities by the responsible public entity.

(b) The findings required by subsection (a) shall be made after notice and an open meeting in compliance with title 8, chapter 44. The private entity proposing the construction, enlargement or acquisition shall bear the burden of proof that the findings required by subsection (a) should be made, and the responsible public entity shall appear and present evidence with respect to subdivisions (a)(5) and (6). If requested by more than fifty (50) residents in the area of the state affected by the transportation facility or facilities, then the regulatory authority shall conduct such open meeting in the affected area.

(c) If a certificate is issued pursuant to this section, it shall be the operator's duty to furnish reasonably adequate service and facilities at reasonable user fees to any persons desiring to use the transportation facilities, and to charge uniformly for the use

of the transportation facilities all persons using the facilities under like conditions. Upon issuance of a certificate, the operator shall be subject to regulation by the department pursuant to title 65, chapter 23.

(d) In issuing the certificate, the regulatory authority shall set forth any reports that the operator needs to file if the information or materials filed with the application change. Except for these reports, the operator shall not be required to update the information or materials filed with the application.

(e) The regulatory authority may charge a reasonable application fee to cover the costs of processing and reviewing an application and may charge a reasonable annual fee to cover the costs of the performance of its duties under this chapter.

Section 54-23-108.

(a) Any private entity requesting approval from the responsible public entity or the issuance of a certificate by the regulatory authority shall notify each affected local jurisdiction.

(b) Each affected local jurisdiction may submit comments relating to a proposed qualifying transportation facility to the responsible public entity or the regulatory authority.

Section 54-23-109.

Any public entity may dedicate any property in which it has an interest for public use as a qualified transportation facility if it finds that so doing would serve the public purpose of this chapter. In connection with such dedication, such public entity may convey any interest that it has in such property, subject to the conditions imposed by general law, to the operator, subject to the provisions of this chapter, for such consideration as such public entity may determine. The aforementioned consideration

may include, without limitation, the agreement of the operator to operate the qualifying transportation facility.

Section 54-23-110.

(a) The operator shall have all power allowed by law generally to a private entity having the same form of organization as the operator and shall have the power to operate the qualifying transportation facility and impose user fees and/or enter into service contracts in connection with the use thereof. No tolls or user fees may be imposed by the operator on any interstate highway and no tolls or user fees may be imposed by the operator on any existing road, bridge, tunnel or overpass without the consent of the affected local jurisdiction and the regulatory authority.

(b) The operator may own, lease or acquire any other right to use or operate the qualifying transportation facility.

(c) Any financing of the qualifying transportation facility may be in such amounts and upon such terms and conditions as may be determined by the operator. Without limiting the generality of the foregoing, the operator may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including the certificate of authority, subject to the provisions of this chapter regarding transfer of the certificate of authority.

(d) In operating the qualifying transportation facility, the operator may:

(1) Make classifications according to reasonable categories for assessment of user fees; and

(2) With the consent of the responsible public entity, make and enforce reasonable rules to the same extent that the responsible public entity could have made rules with respect to a similar transportation facility.

(e) The powers granted to the operator in this section shall be subject to the power of the regulatory authority to approve user fees pursuant to § 54-23-107(c).

(f) The operator shall:

(1) Acquire, construct or improve the qualifying transportation facility in a manner that meets the engineering standards of the responsible public entity for transportation facilities operated and maintained by such responsible public entity, all in accordance with the provisions of the comprehensive agreement;

(2) Keep the qualifying transportation facility open for use by the members of the public at all times after its initial opening upon payment of the applicable user fees and/or service payments; provided that the qualifying transportation facility may be temporarily closed because of emergencies or, with the consent of the responsible public entity, to protect the safety of the public or for reasonable construction or maintenance procedures;

(3) Maintain, or provide by contract for the maintenance of, the qualifying transportation facility;

(4) File with the regulatory authority:

(A) reports describing material contracts with affiliates of the operator;

(B) An accurate schedule of applicable user fees and/or service payments charged for use of the qualifying transportation facility; and

(C) Any other information required by the regulatory authority; and

(5) Cooperate with the responsible public entity in establishing any interconnection with the qualifying transportation facility requested by the responsible public entity.

Section 54-23-111.

(a) Prior to acquiring or commencing construction of or improvements to the qualifying transportation facility, the operator shall enter into a comprehensive agreement with the responsible public entity. The comprehensive agreement shall provide for:

(1) Delivery of performance and payment bonds in connection with the construction of or improvements to the qualifying transportation facility, in the forms and amounts satisfactory to the responsible public entity;

(2) Review of plans and specifications for the qualifying transportation facility by the responsible public entity and approval by the responsible public entity if the plans and specifications conform to standard conditions of the responsible public entity;

(3) Inspection of construction of or improvements to the qualifying transportation facility by the responsible public entity to ensure that they conform to the engineering standards acceptable to the responsible public entity;

(4) Maintenance by the operator of a policy or policies of public liability insurance (copies of which shall be filed with the responsible public entity accompanied by proofs of coverage), self-insurance, in form and amount satisfactory to the responsible public entity and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility;

(5) Monitoring of the maintenance practices of the operator by the responsible public entity and the taking of such actions as the responsible public entity finds appropriate to ensure that the qualifying transportation facility is properly maintained; and

(6) Reimbursement to be paid to the responsible public entity for its cost to provide the services performed by the responsible public entity.

(b) In the comprehensive agreement, the responsible public entity may agree to make grants or loans to the operator from time to time from amounts received from the federal government or any division thereof.

(c) The comprehensive agreement shall incorporate the duties of the operator under this chapter and may contain such other terms and conditions that the responsible public entity determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the responsible public entity agrees to provide notice of default and cure rights for the benefit of the persons providing financing for the qualifying transportation facility. The comprehensive agreement may contain such other terms and conditions to which the operator and the responsible public entity mutually agree.

Section 54-23-112.

The responsible public entity may take any action to obtain federal assistance for a qualifying transportation facility that serves the public purpose of this chapter and may enter into any contracts required to receive such federal assistance subject to appropriation by the general assembly. The responsible public entity may determine that it serves the public purpose of this chapter for all or any portion of the costs of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the federal government or any division thereof.

Section 54-23-113.

(a) The regulatory authority may revoke a certificate for a qualifying transportation facility if:

(1) A material default in the performance of the operator's duties under the comprehensive agreement or under the service contract, if any, has occurred and is continuing;

(2) Acquisition or construction of or improvement to the qualifying transportation facility has not begun by the date established by the responsible public entity as such date has been extended;

(3) For failure to provide reasonably adequate service and facilities at reasonable and uniform user fees as provided by law; or

(4) For failure to comply with any lawful order of the regulatory authority.

(b) Prior to any revocation of a certificate the regulatory authority shall give written notice to the operator and any person providing financing for the qualifying transportation facility, including any trustee or agent for any person providing financing. The operator and the persons providing financing for the qualifying transportation facility shall be entitled to a reasonable time period to cure the event that could lead to a revocation of the certificate. Prior to any revocation of the certificate, the regulatory authority shall conduct a hearing to determine if revocation of the certificate serves the public purpose of this chapter. Any interested party shall be entitled to participate in such hearing, subject to rules established by the regulatory authority that may limit the appearance of parties with substantially identical interests.

(c) Upon the revocation of a certificate of authority, the responsible public entity may exercise any or all of the following remedies:

(1) The responsible public entity may elect to take over the transportation facility or facilities and in such case it shall succeed to all of the right, title and interest in such transportation facility or facilities, subject to any liens on revenues previously granted by the operator to any person providing financing

therefor and the provisions of subsection (d) below. Any liens on the real estate and tangible property comprising the transportation facility or facilities shall be deemed to be extinguished and shall be released on request if the responsible public entity takes over the qualifying transportation facility pursuant to this subsection (c).

(2) Any responsible public entity having the power of condemnation under applicable eminent domain law may exercise such power of condemnation to acquire the qualifying transportation facility or facilities. Nothing in this chapter shall be construed to limit the exercise of the power of condemnation by eminent domain by any responsible public entity against a qualifying transportation facility after revocation of the certificate. Any person that has provided financing for the qualifying transportation facility, and the operator, to the extent of its capital investment, may participate in the condemnation proceedings with the standing of a property owner.

(3) The responsible public entity may exercise all other rights and remedies which may be available to it at law or in equity.

(d) In the event the responsible public entity elects to take over a qualifying transportation facility pursuant to subdivision (c)(1), the responsible public entity shall acquire, construct, improve, operate and maintain the transportation facility, impose user fees for the use thereof and comply with any service contracts as if it were the operator. User fees shall remain subject to approval by the regulatory authority in accordance with the standards set forth in § 54-23-107(c) and, solely for such purpose, the regulatory authority shall retain jurisdiction over the qualifying transportation facility. Any revenues that are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests may appear, to the extent necessary to satisfy the operator's

obligations to secured parties, including the maintenance of reserves. Before such payments to or for the benefit of secured parties, the responsible public entity may use revenues to pay current operation and maintenance costs of the transportation facility or facilities, including compensation to the responsible public entity for its services in operating and maintaining the qualifying transportation facility. Remaining revenues, if any, after all such payments have been made or provided for in an amount not to exceed an amount that will provide the operator with the rate of return on its capital investment approved by the regulatory authority under § 54-23-107 shall be paid to the operator over the time period that the certificate would have been in place had it not been revoked. The right to receive such payment, if any, shall be considered just compensation for the transportation facility or facilities. The full faith and credit of the responsible public entity shall not be pledged to secure any financing of the operator by the election to take over the qualifying transportation facility. Assumption of operation of the qualifying transportation facility shall not obligate the responsible public entity to pay any obligation of the operator from sources other than revenues.

Section 54-23-114.

(a) At the request of the operator, the responsible public entity may exercise any power of condemnation by eminent domain that it has under law for the purpose of acquiring any lands or estates or interests therein to the extent that the responsible public entity finds that such action serves the public purpose of this chapter. Any amounts to be paid in any such condemnation proceeding shall be paid by the operator.

(b) Except as provided in subsection (a) of this section, until a certificate has been revoked, the power of condemnation may not be exercised against a qualifying transportation facility.

(c) After the certificate has been revoked, any responsible public entity having the power of condemnation under law may exercise such power of condemnation as provided in § 54-23-113(c)(2) in lieu of, or at any time after taking over the transportation facility pursuant to § 54-23-113(c)(1).

Section 54-23-115.

The operator and each public utility, railroad, and cable television provider, whose facilities are to be crossed or affected shall cooperate fully with the other in planning and arranging the manner of the crossing or relocation of the facilities. Any such entity possessing the power of condemnation is hereby expressly granted such powers in connection with the moving or relocation of facilities to be crossed by the qualifying transportation facility or that must be relocated to the extent that such moving or relocation is made necessary or desirable by construction of or improvements to the qualifying transportation facility, which shall be construed to include construction of or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Should the operator and any such public utility, railroad or cable television provider not be able to agree upon a plan for the crossing or relocation, the regulatory authority may determine the manner in which the crossing or relocation is to be accomplished and any damages due arising out of the crossing or relocation. The regulatory authority may employ expert engineers who shall examine the location and plans for such crossing or relocation, hear any objections and consider modifications, and make a recommendation to the regulatory authority. In such a case, the cost of the experts is to be borne by the operator.

Section 54-23-116.

(a) All police officers of the state and of each local jurisdiction, shall have the same powers and jurisdiction within the limits of such qualifying transportation facility as

are authorized in such respective areas of jurisdiction and such police officers shall have access to the qualifying transportation facility at any time for the purpose of exercising such powers and jurisdiction. This authority does not extend to the private offices, buildings, garages and other improvements of the operator to any greater degree than the police power extends to any other private buildings and improvements.

(b) To the extent the transportation facility is a road, bridge, tunnel, overpass or similar transportation facility for motor vehicles, the traffic and motor vehicle laws of the state and, if applicable, any local jurisdiction shall be the same as those applying to conduct on similar transportation facilities in the state. Punishment for offenses shall be as prescribed by law for conduct occurring on similar transportation facilities in the state. Section 54-23-117.

The regulatory authority shall determine the date of termination of the original permanent financing and shall terminate the operator's certificate on a date that shall not exceed ten (10) years from the end of the term of the original permanent financing. The regulatory authority may change the termination date to take into account any refinancing of the original permanent financing, including any refinancing for the purpose of expansion, or any early termination of the original permanent financing to the extent that such modification serves the public purpose of this chapter. Upon the termination of the certificate, the authority and duties of the operator under this chapter shall cease, and the qualifying transportation facility shall be dedicated to the responsible public entity or, if the qualifying transportation facility was initially dedicated by an affected local jurisdiction, to such affected local jurisdiction for public use.

Section 54-23-118.

Nothing in this chapter shall be construed as or deemed a waiver of the sovereign immunity of the state, any responsible public entity or any affected local

jurisdiction with respect to the participation in, or approval of all or any part of the qualifying transportation facility or its operation, including but not limited to interconnection of the qualifying transportation facility with any other transportation facility. Counties and municipalities in which a qualifying transportation facility is located shall possess sovereign immunity with respect to its construction and operation.

SECTION 2. Tennessee Code Annotated, Section 65-3-101, is amended by deleting the section in its entirety and by substituting instead the following language:

§ 65-3-101. All railways and operators issued a certificate for qualifying transportation facilities pursuant to title 54, part 23, are declared subject to the provisions of this chapter, and all individuals, companies, corporations, trustees, receivers, and lessees, owning, operating, and managing such railways for the transportation of freight and passengers, and qualifying transportation facilities are declared common carriers.

SECTION 3. The commissioner of transportation is authorized to promulgate rules and regulations to effectuate the purposes of this act. All such rules and regulations shall be promulgated in accordance with the provisions of Tennessee Code Annotated, Title 4, Chapter 5.

SECTION 4. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to that end the provisions of this act are declared to be severable.

SECTION 5. For purpose of promulgating rules and regulations, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect July 1, 2007, the public welfare requiring it.